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No. 71-730

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In the Supreme Court of the United States

OCTOBER TERM, 1971

JAMES W. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. C) is reported at 447 F. 2d 1285. The panel opinions of the court of appeals (Pet. App. A and B) are reported at 424 F. 2d 344 and 431 F. 2d 1168, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1971. A petition for rehearing was

denied on November 4, 1971. The petition for a writ of certiorari was filed on December 2, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of expert testimony as to the value of certain oil properties denied petitioner the constitutional right of confrontation or violated the hearsay rule.

2. Whether petitioner was subjected to illegal multiple prosecutions, or was otherwise prejudiced by pretrial proceedings conducted by the trustee in bankruptcy and by the Securities and Exchange Commission.

STATEMENT

1. After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of having conspired to violate 15 U.S.C. 77e(a) and 78ff(a) and 18 U.S.C. 1001 and 1341, and also of twelve substantive mail fraud violations (18 U.S.C. 1341). Subsequently, he was also convicted in the same court of a separate, though related, charge of conspiracy to manipulate unlawfully the price of the common stock of Westec Corporation, in violation of 15 U.S.C. 78i(a)(1) and (2).[1] On the first prosecution, petitioner was sentenced to a total of ten years' imprisonment; on the second, he received a sentence

[1] On this charge, petitioner entered a plea of not guilty, waived trial by jury, and agreed to the filing of a written stipulation to the effect that all of the factual allegations contained in the information were true and correct.

of five years' imprisonment, the term to run consecutively to the ten year sentence.

Petitioner appealed both convictions, and the cases were consolidated in the court of appeals. A panel of the court of appeals reversed the first conviction, holding that the admission of testimony of an expert as to the value of the properties in question was violative of petitioner's right to confrontation because the expert's opinion was based principally on documents not qualifying as federal business records and no witnesses were produced to authenticate them (Pet. App. A, pp. 23-30). The second conviction was affirmed. The panel rejected, *inter alia*, the claims raised here as to improper multiple prosecutions and abuse in the proceedings of the investigative bodies (Pet. App. A, pp. 30-34).

Thereafter, the government filed a timely petition for rehearing and a suggestion for rehearing *en banc* as to the reversal of the first conviction, and petitioner filed a similar petition with respect to the affirmance of the second conviction. On September 16, 1970, the panel denied both petitions for rehearing with an opinion adhering to and further elaborating the basis for its rulings (Pet. App. B; pp. 37-51). On the same date, the full court granted the government's petition for rehearing *en banc* with respect to the question of the "admissibility of the testimony of the expert witness Jeffrey." Following the filing of briefs, the *en banc* court, by a vote of thirteen to three,[2] reversed the decision of the panel

[2] The three dissenters were the members of the original panel, who adhered to their views.

and affirmed in all respects the judgment of the district court (Pet. App. C, pp. 52-66; 447 F.2d 1285).

2. In summary, the evidence showed that, in September 1964, Westec Corporation, which engaged primarily in the mining and marketing of uranium in Arizona, merged with Geo Space Corporation, which at the time was heavily in debt and in need of extra capital (App. 551, 560-567, 582). Petitioner became Chairman of the Board of Westec following the merger.

Prior to the merger, one of the owners of Geo Space Corporation, co-defendant Ernest M. Hall, had sought additional financing from Business Funds, Inc. (BFI), a small business investment company. Petitioner, the senior vice-president of BFI, was instrumental in granting the loan and inducing Geo Space Corporation to merge at that time with another company also heavily indebted to BFI. As a result of that merger, BFI became a "silent partner" in Geo Space Corporation as a creditor for approximately four million dollars (App. 552-555, 563, 564, 1874-1877, 1881).

The Westec 1964 Annual Report of March 31, 1965, contained the company's first financial statement after the merger; it included false and fraudulent statements of earnings designed to create the appearance of activity in the stock, to show a dynamic increase in profits, and thus arouse the interest of the investing public (App. 582-587, 612-627, 1601, 1142-1145, 1322, 1602-1603). The Westec interim report for the second and third quarters of 1965 reported net income of which 33% in one case and 96% in the other was false and fraudulent due to the listing of amounts

said to be derived from purported "oil sales." No such sales ever occurred (App. 646-654, 662-672, 1328-1341, 1581-1583).

The Westec Annual Report for 1965 contained a consolidated statement of earnings which was also false and fraudulent. It reported two and one-quarter million dollars of income from the sale, at a grossly overvalued price, of oil and gas interests to a relative of Fred Hall, the brother of co-defendant Ernest Hall, under other than "arms length" conditions which were not disclosed in the report (App. 1233-1258, 1583-1586, 1657). Further, the sums of money necessary to pay Westec the overvalued price for the oil properties were raised from the unregistered public sale of Westec stock controlled by petitioner and Hall (App. 1610-1613).

In similar fashion, the interim consolidated financial statement of Westec for the first and second quarters of 1966 included, among other false and fraudulent statements, the amount derived from one "oil sale" to relatives of Hall at a grossly overvalued price in a transaction that was not at "arms length", and a second "oil sale" which did not occur and was never documented (App. 786-797, 1248, 1586-1587, 1591-1596). Shortly thereafter, the American Stock Exchange suspended trading in Westec stock (App. 796).

3. At trial, the government introduced proof through different witnesses that the alleged income received from the sales of the oil property was not properly included in Westec's earning statements for 1965 and part of 1966, thus making such financial statements false. One of these witnesses, Thomas Jeffrey,

gave expert testimony as to the actual values of the properties at the time of the sales (App. 1233-1258). Jeffrey had been the petroleum engineer who had been employed by Fred Hall to manage the oil properties, to inspect them, and to prepare an evaluation of them (App. 1237, 1239). When Jeffrey testified as to his opinion of the actual values of the oil properties in question on the applicable dates, no objection was raised by petitioner as to Jeffrey's qualifications as an expert, the validity of the techniques and procedures he had utilized in formulating his opinion, or the adequacy of the personal investigation which Jeffrey had conducted of the properties in question (App. 1236, 1242-1243).

Petitioner objected instead, only to the failure of the government to authenticate and introduce into evidence, as a predicate for Jeffrey's expert opinion, the underlying documents that had been furnished to Jeffrey by Fred Hall, and upon which Jeffrey had relied in part in arriving at his valuation. (App. 1258-1266). The objection was overruled. At the end of the direct examination, the government offered into evidence Jeffrey's two appraisal reports. After an objection by defense counsel that the exhibits themselves were hearsay and that their admission would deny petitioner his right to confrontation, the court ruled that the reports would be excluded. (App. 1249). Thereupon defense counsel cross-examined Jeffrey at some length as to the sources of the material on which he had relied (App. 1250-1258). The record also reflects that Jeffrey stated in open court that the documents upon which he had relied in formu-

lating his appraisal reports and opinion were available in the event that the defense desired their production for purposes of further cross-examination (App. 1258). The defense chose not to recall Jeffrey for further cross-examination.

ARGUMENT

1. Petitioner here reasserts the claim dealt with exhaustively below that the admission of Jeffrey's expert testimony denied him the constitutional right of confrontation and violated the hearsay rule. The opinion of the court of appeals *en banc* (Pet. App. C, pp. 52-65) properly concluded that the expert testimony as presented was admissible and that the position advanced by petitioner would seriously hamper the use of expert testimony in federal courts.

a. As the opinion points out, the salient fact that Jeffrey was personally available for cross-examination by petitioner, as to the information underlying his conclusions, as to the actual values he placed on the properties, and as to his reasoning processes in making the valuations, rendered his testimony constitutionally admissible under the principles of *California* v. *Green*, 399 U.S. 149. Significantly, Jeffrey was able to recall and explicate fully before the jury the basis for his opinion. Defense counsel on cross-examination elicited all possible evidence which would tend to reduce the weight to be given to Jeffrey's expert valuations. For example, it was brought out that Jeffrey had not been told that the records he examined were correct; that Jeffrey did not prepare the reports on which he relied; and that Jeffrey had not surveyed

the land himself (App. 1251-1257). Jeffrey, on the other hand, testified that he had done what is customary in his profession with regard to verifying and accepting the various reports of the two companies which he had used in his valuation of the oil and gas properties (App. 1235-1236, 1252). In these circumstances, as the trial court properly charged, the weight of the evidence was for the jury (App. 2002).

b. Nor was Jeffrey's expert testimony inadmissible here under the hearsay rules of evidence. The law is clear that if an expert witness has gone to many sources, some or all of which are hearsay, and has used them all in connection with his professional experience to reach an opinion, rather than just introducing summaries of each source, the expert's opinion is admissible evidence in its own right and is not a mere attempt to introduce hearsay in disguise. See, *e.g.*, *United States* v. *Alker*, 260 F.2d 135 (C.A. 3); *Birdsell* v. *United States*, 346 F.2d 775, 779-780 (C.A. 5), certiorari denied, 382 U.S. 963. Accordingly, the expert testimony here was properly admitted. Jeffrey did not recite to the jury the hearsay contents of any business records; he gave his opinion of the dollar value of the properties as of a certain date, which opinion was made up of his careful and studied synthesis of all the available information concerning the property.

2. Petitioner also raises here two issues which were considered and properly rejected by the panel below (Pet. App. A, pp. 30-31; Pet. App. B, pp. 49-51). They do not warrant further review by this Court.

a. Petitioner objects first to the fact that he was given separate trials. But, while both prosecutions had their genesis in the collapse of Westec Corporation, they involved different facts and different crimes, each requiring proof of elements different from the other. Accordingly, neither the claim of illegal multiple prosecutions, nor the defense of double jeopardy is valid.

b. Nor is there any substance to the claim of prejudice because pretrial investigations were conducted by administrative agencies. The bankruptcy examination and the concurrent investigation by the Securities and Exchange Commission (SEC) were both conducted in the customary manner, with strict adherence to the statutory provisions and precedents relating to each inquiry. In both proceedings, petitioner was represented by counsel and was not forced to testify. Furthermore, a full pre-trial hearing was conducted, in which the trial court allowed defense counsel the unrestricted opportunity to cross-examine SEC personnel and the trustee in bankruptcy, and to elicit any other evidence that could possibly support the defense's contention that the bankruptcy hearing was a mere facade for a public SEC investigation designed to incriminate petitioner. At the conclusion of the hearing, the trial court ruled that petitioner's contentions were not valid.[3]

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[3] To the extent that petitioner also complains of prejudice because of the grand jury investigation, his complaint is unfounded. Approximately one and one-half years after the other investigations, petitioner was indicted by an impartial and validly empaneled grand jury which conducted its inquiry in secret in the prescribed manner (Pet. App. A, pp. 30-31).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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